IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 154 of 1995

Reserved on: 31.8.2007

Date of decision: 21.9.2007

Lachhmi Ram & Ors. ... Appellants

Versus

Kirpa Nand & Ors. … Respondents

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] Yes.

For the appellants: Mr. Bhupender Gupta, Senior Advocate with Ms. Charu Gupta, Advocate.

For the respondents: Mr. B.K. Sood vice Mr. K.D. Sood, Advocate, for respondents No. 1 to 3.

V.K. Ahuja, J.

This judgment shall dispose of Regular Second Appeal filed by the appellants under Section 100 C.P.C. against the judgment and decree passed by the learned District Judge, Solan on 26.12.1994 reversing the judgment and decree passed by the learned Sub Judge, Kandaghat, vide which the suit of the appellants was decreed and they were declared absolute owners of the suit property and were also held entitled to possession of the suit land.

Briefly stated the facts of the case are that the suit land owned by one Het Ram who mortgaged it with Deep Ram and Anokhi Ram. Het Ram was succeeded by his son Badri Dutt and widow

[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Devkoo. Badri Dutt also left behind Devkoo as the sole owner of this property and she made a gift of this property in favour of defendants No. 1 to 3. Deep Ram and Anokhi Ram transferred the mortgagee rights in favour of one Gursaran in the year 1952 A.D. who had four children, namely, Kanhya, Umed Ram, Dashodha and Nainawati. Thus the mortgagors became the defendants No. 1 to 3 and became the children of Gursaran by derivative titles. An application was moved by defendants No. 1 to 3 under Section 4 of the H.P. Redemption of Mortgages Act, 1971 on 1.6.1977 before the Assistant Collector Ist Grade, Kandaghat and that application was allowed by the Assistant Collector Ist Grade. A suit was filed by Kanhya one of the mortgagees. In view of the order passed by the Assistant Collector Ist Grade, the possession was taken back by defendants No. 1 to 3 and in the suit filed by Kanhya, he challenged the order of the Assistant Collector Ist Grade that this application was filed by the defendants after expiry of 30 years from the date of mortgage and the mortgagees had become owners by afflux of time.

The contesting defendants supported the order of redemption being legal and possession was taken by them legally.

The learned trial Court framed issues in regard to limitation and as to whether the order of the Assistant Collector Ist Grade was null and void apart from other issues. The learned trial Court concluded that the plaintiffs had already become owners by afflux of time and the application filed before the Assistant Ist Grade was time barred who had no jurisdiction to entertain the same and the said order was held to be void and the plaintiffs were accordingly held entitled to possession apart from the finding that they are absolute owners of the suit property.

On an appeal those findings were reversed by the learned first Appellate Court who took up the view that the application filed by the defendants for redemption was well within time and, therefore, the order passed by the Assistant Collector Ist Grade was legal and accordingly findings of the learned trial Court were reversed and the suit of the plaintiffs was dismissed. Plaintiffs are before this Court by way of second appeal who have assailed the findings of the learned first Appellate Court.

I have heard the learned counsel for the parties and have carefully gone through the record of the case file.

The submissions made by the learned counsel for the appellants were that period of limitation has to be taken from the date of mortgage and the mortgage was effected by entering rapat with the Patwari and accordingly in case the date of mortgage is taken from the date of rapat which view was taken by the trial Court, the application was filed beyond 30 years. On the other hand, the submissions made by the learned counsel for the respondents were that the period of limitation starts from the date mutation which was attested after the mortgage and accordingly taking the date of the mutation, the application was well within time and, therefore, the findings of the learned first Appellate Court are correct. A plea was also taken by defendants that transfer of mortgagee rights will give fresh cause of action to file the suit/application for redemption though no specific issue was framed by the learned trial Court in this regard.

Before I refer to the case law, I may make a reference to the facts of the case that the mortgage in question was created with possession in pursuance of rapat Ext. PW2/A which is dated 29.10.1946. This rapat was proved from the statement of PW-2 Patwari who had

stated that he had prepared this rapat Ext.PW2/A dated 29.10.1946, which is correct as per the record. He has also proved the copy of mutation Ext.PW2/B which was attested on 29.2.2004 which comes to 11.5.1947. Both these documents have been duly proved from the statements of Patwari who had brought the record and these are documents which are over 30 years and were per se admissible in evidence also However, the Patwari had proved these documents which can be legally read in evidence.

The question which arises for consideration is as to whether the date of mortgage has to be taken from the date when the rapat was entered in regard to the mortgage or the date when the mutation was attested on that basis after the mortgage.

To substantiate his plea the learned counsel for the respondents had relied upon the following decisions:

The decision in **Ranbir Singh and others** Vs**. Gita Ram and others**, **1992(2) Sim. L.C. 424**, shows that report regarding mortgage of suit land to Patwari by mortgagors and mortgagee was made on 13.6.1908. Mutation of mortgage on 26.2.1910 attested by Revenue Officer and signed by son of mortgagee amounting to acknowledgement of subsisting mortgage and liability of its redemption by mortgagors. It was held in view of the facts of the case that starting point of limitation is to be taken from 26.2.1910 and from conduct of parties and other attending circumstances show that it could be inferred that son of mortgagee had authority to make acknowledgement in respect of property or right on behalf of mortgagee. The facts of this case are different since there was a due acknowledgement by the son of mortgagee which give a fresh cause of action to the mortgagor to file the

suit by mortgagor within the period of limitation prescribed therein which was 60 years in that case.

The decision in **Ajit Singh and others** Vs. **Kirpal Singh, (deceased by L.Rs.) and others**, **AIR 2003 Punjab and Haryana 209**, was relied upon. Since in that case there were additional mortgages in respect of land previously mortgaged. It was held that suit for redemption within 30 years from subsequent additional mortgages of land previously mortgaged, not barred by limitation as additional mortgages constitute valid acknowledgement. In the present case there was no additional mortgage to give fresh cause of action to the mortgager to get the land redeemed.

The decision in **Shapoor Fredoom Mazda** Vs. **Durga Prosad Chamaria and others**, **AIR 1961 Supreme Court 1236**, shows that acknowledgement as prescribed by Section 19 merely renews debt; it does not create a new right of action. It is a mere acknowledgement of the liability in respect of the right in question; it need not be accompanied by a promise to pay either expressly or even by implication.

The decision in **Gurbux Singh and another** Vs. **Smt. Chinti and others**, **AIR 1975 Punjab and Haryana 17**, shows that in that case there was gift by A of his mortgagee rights in land owned by C in favour of B. It was held that mere description of gifted property as mortgagee rights is not acknowledgement of C's right within Section 19 to redeem land.

Coming to the facts of the case as mentioned above, the mortgage with possession was created by lodging of rapat on 29.10.1946 and the mutation was attested after sometime on

11.6.1947. The mutation may or may not have been attested immediately and it may be attested after number of years due to one reason or the other, but the date of mortgage remains the same when the mortgage was created by means of rapat lodged with the Patwari. In case there was no other proof on record in regard to creation of mortgage except the facts that emerge from the time of mutation it could be said that the date of mutation was the date of mortgage. But in the present case, the date of rapat lodged with the Patwari can be said to be the date when the mortgage was created and since the mortgage was created on 29.10.1946, the period of limitation expired on 29.10.1976 but the application was filed before the Assistant Collector Ist Grade on 1.6.1977 as per Ext.PA, copy of the order of Assistant Collector Ist Grade and therefore, the period of limitation had already expired by that time. Coming to the plea that in between the mortgagee right in respect of the suit land were mortgaged by Deep Ram and Anokhi Ram for a sum of Rs.700/- vide mutation No. 108 attested on 28.4.1952, vide Ext. AX. The mortgager was not a party to Ext. AX and there was no acknowledgement in favour of the mortgager in writing and as such, it did not give a fresh cause of action to the mortgager to redeem the suit land from that date.

The learned trial Court had considered this question also as to whether the date of mortgage should be taken as the date when the report was lodged with the Patwari or the date of mutation and had rightly observed that the mutation does not create any title, it is entered only to keep the record upto date. The learned trial Court had rightly come to the conclusion after referring to the case law that the application filed for redemption after expiry of period of limitation cannot be said to be valid and the subsequent order passed by the Assistant

Collector Ist Grade was held to be nullity. The learned first Appellate Court had not given its reasoning for differing with the findings recorded by the learned trial Court that date of mortgage has to be taken as the date when the report was lodged. It came with another plea that Gursaran had acquired mortgagee rights in the suit land in April, 1952 when he acknowledged the factum of mortgage and the period of limitation will start from that date. I have already held above that mortgager was not a party to the said transaction and there was no acknowledgement by the mortgager in this regard and as such, I am unable to agree with the findings recorded by the learned first Appellate Court and the findings recorded by the trial Court can be said to be correct in view of the reasoning given therein.

In view of the above discussion, I accordingly hold that the appeal filed by the appellants is liable to be allowed and the judgment and decree passed by the learned first Appellate Court is set aside and that of learned trial Court is restored. However, the parties are left to bear their own costs throughout. Decree sheet be prepared accordingly. A copy of judgment alongwith record be sent to both the Courts below.

(V.K. Ahuja),
Judge

September 21, 2007
(BSS)